BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

REPLY COMMENTS OF COMCAST CORPORATION

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I. INTRODUCTION AND SUMMARY

The Commission's telecom pole rate proposal is fully consistent with the text and legislative history of Section 224. The Supreme Court has repeatedly recognized the broad methodological leeway that ratemaking agencies have to interpret the ambiguous statutory directive of "cost" in implementing the objectives of Congress. Further, the legislative history of Section 224(e)(2) clearly refutes the electric utilities' unfounded argument that the Commission is *required* to use "fully allocated costs" in the telecom pole rate formula. The telecom pole rate proposal is fully and reasonably explained by the Commission and is overwhelmingly supported by the record.

Electric utility arguments that broadband pole attachment rates should be increased to at least the current telecom rate are utterly unsupported by the record and such pole rate increases would undermine critical national broadband objectives. The American Recovery and Reinvestment Act of 2009, Section 706 of the Telecommunications Act of 1996, the National Broadband Plan, and the comments in this proceeding all justify the Commission's proposal to eliminate unnecessary and redundant capital costs from the telecom pole rate formula in order to promote broadband investment, adoption and competition.

The comments demonstrate that no change to the existing sign and sue policy is warranted and that the Commission's proposed modification would impose significant new burdens and delays on attachers' access to poles. Several pole owners concur with attachers that the relationship between pole owners and attachers is largely successful and that parties rarely have to resort to the Commission to resolve disputes. However, the record also shows that a number of pole owners persist in imposing non-negotiable, boilerplate terms and conditions that conflict with prior Commission rulings. Requiring a new written objection process as a

precondition to challenging an agreement will undermine the significant improvements that could be achieved through the proposed changes to the Commission's pole access rules.

Attachers – including some pole owners – also oppose giving the electric utilities broader powers to impose sanctions for purported unauthorized attachments. The record provides significant additional evidence as to why utility unauthorized attachment studies are misleading and grossly exaggerate the number of "unauthorized" attachments. As the brief Oregon experience demonstrates, pole owners will move quickly and unfairly to exploit any expanded authority to impose penalties on attachers for purported unauthorized attachments.

The Commission can further ensure reasonable pole access by correcting an apparent electric utility misunderstanding regarding when access can be denied based on "insufficient capacity." The law is clear that the electric utilities do not have unilateral discretion to make that determination. The Commission should also clarify that performing make-ready, including in the power space, does not constitute "expanding capacity." Moreover, pole "change outs" have always been accommodated as make-ready under Section 224 and Congress did not mean to terminate pole access by equating change outs with expanding capacity.

Finally, the comments add to the ample existing record detailing the superior pole attachment rights enjoyed by ILECs under their joint use and joint ownership arrangements. Consequently, if the Commission finds that ILECs do possess rights under Section 224, any regulated pole rates crafted for ILECs must take into account ILEC pole rights that are far superior to those of competing cable and CLEC attachers.

II. THE COMMISSION'S TELECOM POLE RATE PROPOSAL IS FULLY CONSISTENT WITH SECTION 224

A. Background

The electric utilities ("utilities") contend that the Commission's proposal to move the telecom pole rate formula from a fully allocated cost methodology to a more economically efficient cost causation model conflicts with the plain language of Section 224 and its legislative history.[1] The utility arguments generally contest the Commission's conclusion that the term "cost" in Section 224(e) is ambiguous. The utilities argue that Section 224(e) and its legislative history clearly equate the phrase "cost of providing space" with the "fully allocated costs" of owning and maintaining poles as specified for the "upper bound" of cable pole rates under Section 224(d).

In addition, the utilities argue that Section 224(e) requires a "single telecom rate formula based on the cost of providing space" and that Congress intended the resulting rate to be higher (and different) than the cable rate.[2] Finally, the utilities assert that the Commission's rate proposal is a "radical departure" from the decades-long practice of using the fully allocated costs of owning and maintaining poles to calculate pole rates – and that the proposal does not adequately explain this change in policy.[3]

As demonstrated below, the utilities are wrong on all counts and the Commission's proposal is well within the bounds of its statutory authority.

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[1] *See, e.g.*, Comments of the Edison Electric Institute/United Telecom Council at 65-67 ("EEI/UTC Comments"); Comments of the Alliance for Fair Pole Attachment Rules at 86-91 ("Utility Alliance Comments"); Comments of the Coalition of Concerned Utilities at 106 ("Utility Coalition Comments"); Comments of the Florida Investor-Owned Electric Utilities at 57-63 ("Florida Utilities Comments"); Initial Comments of Oncor Electric Delivery LLC at 61-63 ("Oncor Comments"). All citations to comments in this reply are to those filed in August 2010, unless otherwise indicated.

[2] *See, e.g.*, Utility Alliance Comments at 83-86; Florida Utilities Comments at 59-61; EEI/UTC Comments at 71-74; Oncor Comments at 59-61.

[3] *See, e.g.*, Utility Alliance Comments at 92-96; Florida Utilities Comments at 63-64; EEI/UTC Comments at 67.

B. The Commission has Broad Authority to Establish the Telecom Pole Rate Cost Methodology

The comments confirm that the Commission has ample authority to interpret the phrase "cost of providing space" to exclude capital costs in implementing the Section 224(e) telecom pole rate formula. While the utilities argue that the meaning of this phrase is clear and must refer to the "fully allocated cost" of owning and maintaining poles, the text, legislative history and structure of Section 224 all show that the meaning of the phrase "cost of providing space" is ambiguous. In light of this ambiguity and the broad discretion normally accorded ratemaking agencies, the Commission is authorized to define the relevant "costs" consistent with the purposes and constraints of Section 224 as well as the urgent national policies to promote broadband deployment and competition.

The Telecommunications Act of 1996 ("1996 Act") is "a model of ambiguity"[4] and this ambiguity is magnified when it comes to defining the term "cost." Many courts have recognized, as the Commission has acknowledged, that the word "cost" has no "clear implication"[5] and "is a chameleon, . . . a 'virtually meaningless' term."[6] The Supreme Court has repeatedly held that regulatory agencies have "broad methodological leeway" in setting rates when those rates are to be based on "cost."[7] Moreover, where the word "cost" is used as "an intermediate term in the calculation of just and reasonable rates . . . regulatory bodies required to set rates expressed in those terms have ample discretion to choose methodology."[8] In essence,

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[4] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).
[5] *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 469, 500 (2002).
[6] *Strickland v. Commissioner, Maine Dep't of Human Servs.*, 96 F.3d 542, 546 (1st Cir. 1996) (cited in *Verizon*, 535 U.S. at 500).
[7] *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 423; *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *Verizon*, 535 U.S. at 501-02.
[8] *Verizon*, 535 U.S. at 498, 500 (The "intermediate use" referred to by the Court is Section 252(d)(1)'s directive that the Commission set the "just and reasonable rate for network elements . . . based on the *cost . . . of providing the . . .*

an agency's ratemaking function "involves the making of 'pragmatic adjustments'"[9] that are "appropriate for the solution of its intensely practical difficulties."[10]

These bedrock ratemaking principles are directly applicable to the Commission's pole rate proposal. The utilities argue that the plain language of Section 224(e)(2) unambiguously directs that the phase "cost of providing space" means the fully allocated cost of providing space – as spelled out in the upper bound of the *cable* rate formula in Section 224(d). However, as the Supreme Court has observed, the utilities "have picked an uphill battle."[11] Section 224(e)(2) uses the inherently ambiguous word "cost" without providing any express definition or in any way tying it to the upper bound cable pole formula – and it is used as an "intermediate term in the calculation of just and reasonable rates."[12] As the Supreme Court has repeatedly held, such a statutory scheme provides the Commission with broad authority to adopt a cost methodology to advance the purposes of the Act. Moreover, where the text of a statute is ambiguous, courts will defer to any reasonable interpretation of the implementing agency.[13]

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network element.") (emphasis added). The Court explained that this intermediate use of the term "cost" further undercut the utility arguments that the word cost had a "plain meaning" under the statute.

[9] *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (*quoting Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 576, 586 (1942)).

[10] *Permian Basin*, 390 U.S. at 790 ("We must reiterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.").

[11] *Verizon*, 535 U.S. at 498.

[12] Section 224(e)(1) directs the Commission to establish just, reasonable and nondiscriminatory rates for telecommunications pole attachments taking into account the "cost of providing space" and cost allocation method set out in Section 224(e)(2).

[13] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). *See also Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1045 (11th Cir. 2003) ("At most, Georgia Power's efforts at statutory interpretation can go only far enough to show that § 224(e) is ambiguous at *Chevron*'s step one. Thus, we must defer to any reasonable agency interpretation of the statute.").

C. The Text and Legislative History of Section 224(e) Establish That Use of Fully Allocated Costs is Not Required

1. The Text of Section 224(e) Does Not Require Use of Fully Allocated Costs

The text of Section 224 does not mandate equating the costs in the *telecom* pole rate formula with the costs used in the upper bound of the *cable* rate formula. The utilities concede that Section 224(e)(2) refers to allocating the "cost of providing space on a pole" and that the upper bound of the cable rate formula in Section 224(d) refers to "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . . ."[14] Despite this clear distinction in language, they argue that the "cost" phrase in Section 224(e)(2) presumes the use of fully allocated costs as provided for by the upper bound cable formula.[15]

Basic principles of statutory construction recognize that Congress intended a different meaning when it used different words to explain terms in the same section of a statute. As the Eleventh Circuit observed previously in interpreting Section 224, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[16] If Congress had intended to require that the costs in Section 224(e)(2) were to be

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[14] *See* EEI/UTC Comments at 65 ("Congress did not need to specifically identify which costs were to be included in the telecom rate formula because the plain language of the statute calls for 'the cost of providing space,' which was already defined by Congress in Section 224(d) as the fully allocated cost.").

[15] *See, e.g.*, EEI/UTC Comments at 66 ("Congress saw no need to change this approach in 224(e) and therefore simply referred to this fully-distributed cost approach as 'the cost of providing space.'"); Oncor Comments at 62 ("Congress did not need to define what is apparent from Sections 224(d)(1), 224(e)(2) and (e)(3)."); Florida Utilities Comments at 64 ("In fact, given the settled use of these factors [the upper bound cable rate formula components] in pole attachment ratemaking, Congress is presumed to have adopted them . . . .").

[16] *Georgia Power v. Teleport*, 346 F.3d at 1045 (11th Cir. 2003) (*quoting CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-26 (11th Cir. 2001)). *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 496-97 (1992) (concluding that "[t]he fact that Congress chose to use different terms [in the same section of a statute] surely indicates that Congress intended the two terms to have different meanings"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *United States v. Maria*, 186 F.3d 65, 71 (2d Cir. 1999) ("As a general matter, the use of different words within the same statutory context strongly suggests that different meanings were intended."); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("When Congress uses explicit language in one part of a statute to cover a

the same as the fully allocated costs specified for the upper bound cable rate in Section 224(d), it would simply and directly have said so.

The utilities' theory also fails logically because the 1996 amendments to Section 224 left the Commission's preexisting authority intact to set cable attachment rates based on a broad range of allocable costs under Section 224(d). The Commission retained the authority to set the cable rate on the basis of incremental cost at the lower bound, and fully allocated cost at the upper bound – or any other subset of costs as long as they produced a rate within that range. In other words, Congress could not have intended that the "cost of providing space" meant exclusively the use of fully allocated costs under Section 224(d) when the Commission retained the authority to revise the cable rate formula (including the "costs" being allocated) within a range all the way down to incremental costs at any time.[17] Contrary to the utilities' contentions,[18] if Congress had intended to equate the allocable costs in Section 224(e) with the upper bound of costs allocable under Section 224(d), or had intended to do away with the Commission's longstanding authority to modify the costs to be allocated under Section 224(d), it would have said so – or amended Section 224(d) to require the Commission to only apportion fully allocated costs. Instead, the 1996 Act retained the Commission's historic flexibility to set cable attachment rates consistent with the 224(d) range and further provided the Commission

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particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."); Sutherland on Statutory Construction at 249 n.8 ("The same words used twice in the same act are presumed to have the same meaning. Likewise courts do not construe different terms within a statute to embody the same meaning.").

[17] Congress originally assumed that the Commission would set cable attachment rates somewhere between the upper and lower bounds in adopting Section 224. S. Rep. No. 95-580, at 19 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 109, 127.

[18] *See* note 15 *supra.*

with the discretion to adopt a cost methodology under 224(e) that would best serve the evolving objectives of the Communications Act.[19]

2. *The Legislative History of Section 224(e) Shows Congress Rejected a Fully Allocated Cost Requirement*

The legislative history further demonstrates that Congress did *not* intend to bind the Commission to a strict "fully allocated cost" methodology in establishing the telecom rate formula. This intent is reflected in the 1996 Act Conference Report[20] and is established by tracking the telecom pole rate formula language in the competing House and Senate bills[21] that led to the ultimate adoption of the Senate provisions amending Section 224. Comparing these bills shows that while the House favored a fully allocated cost approach to telecom pole rates, the Senate had a very different and more flexible view – one designed to preserve Commission discretion to fashion appropriate rates for telecommunications pole attachments. Congress' eventual adoption of the Senate pole attachment provision demonstrates that the fully allocated cost mandate pressed by the House was repudiated.

As it progressed through the House, Section 105 of H.R. 1555 contained the language sought by the electric utilities requiring the Commission to impose "fully allocated costs" under the telecom pole formula. The July 1995 version of H.R. 1555 would have directed the Commission to establish telecom pole attachment regulations reflecting fully allocated costs in recognition that "the entire pole . . . other than the usable space is of *equal benefit [to] all entities attaching to the pole* and therefore apportion the cost of the space other than the usable space

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[19] Congress left the Commission the broad discretion it normally affords to ratemaking agencies to adopt a methodology that best advances the policy objectives of the agency.

[20] *See* H.R. Rep. No. 104-458 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124 (the "Conference Report"). The Conference Report is identical to S. Rep. No. 104-230 (Conf. Rep.).

[21] *See* H.R. 1555, 104th Cong. (1995); S. 652, 104th Cong. (1995).

equally among all such attachments."[22] When the House approved S. 652 (which ultimately became the 1996 Act) and returned it to the Senate for consideration in October 1995, the House replaced the Senate's telecom rate formula language (described below) with the House's own fully allocated cost approach.[23]

In contrast to the House, the Senate's telecom rate formula approach never required "fully allocated costs." In fact, S. 652 initially recognized "that the entire pole . . . other than the usable space is of *equal benefit* to all attachments of entities *that hold an ownership interest in the pole* . . . and therefore [the Commission must] apportion the *cost of the space* other than the usable space equally *among all such attachments.*"[24] However, in June of 1995, the Senate amended Section 204 of S. 652 to direct that Commission regulations require that the "cost of providing space on a pole" to telecommunications carriers be based on the sum of "(A) two-thirds of the *costs of providing [unusable] space"* equally allocated among all attachers, plus "(B) the percentage of usable space required by each such entity multiplied by the *costs of space*

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[22] H.R. 1555 § 105(d)(1)(A) (as reported by H. Comm. on Commerce, July 24, 1995) (emphasis added). *See* Attachment 1 hereto. The House Report accompanying this version of H.R. 1555 explained that, under Section 105, the Commission telecom rate formula must impose fully allocated costs and recognize that the unusable space was of "equal benefit" to all attaching entities. H.R. Rep. No. 104-204, at 92 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 58-59. *See* Attachment 2 hereto.

[23] The amended version of S. 652 that the House approved on October 12, 1995 included an even harsher version of the telecom rate formula than in previous House versions of Section 105 of H.R. 1555. The House amendment to Section 204 of S. 652 also required the Commission's regulations to "recognize that the pole . . . has a value that exceeds costs and that value shall be reflected in any rate." S. 652, 104th Cong. § 106(d)(1)(C) (as passed by House, Oct. 12, 1995). *See* Attachment 3 hereto.

[24] S. 652, § 205(b)(2)(A) (as reported by S. Comm. on Commerce, Mar. 30, 1995) (emphasis added). *See* Attachment 4 hereto. Thus, from the outset, the Senate view was that the "cost" of unusable space was of equal benefit to the *pole owners'* attachments (not third party attachments as the House bill provided) and directs that the cost of that pole space be divided equally among "such attachments" (i.e., the pole owner attachments, *not* third party attachments). This early version of the Senate bill went on to explain that a third party attacher benefits from the unusable space on a pole "in the same proportion as it benefits from the usable space" – directly contrary to the House approach.

other than the usable space."[25] This version of Section 204 was approved by the Senate in passing S. 652 and was sent to the House for its consideration.[26]

The Senate disagreed with the House amendments requiring, inter alia, fully allocated costs, and S. 652 went to the conference committee. As explained in the Conference Report, "[t]he conference agreement adopts the Senate provision with modifications. . . . New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities."[27] This history shows that the Conference Agreement *rejected* the House telecom rate methodology requiring the Commission to use fully allocated costs in favor of the Senate approach. Obviously, if Congress had intended for 224(e)(2) to require use of fully allocated costs as the utilities contend, Congress could have simply adopted the House language that accomplished that very result (as explained in the Conference Report and earlier in H. Rep. No. 104-204). Instead, Congress adopted the Senate provisions, which had never expressed any intent to mandate fully allocated costs.[28]

In addition, because the last version of subsection 204 passed by the Senate distinguished between the "cost of *providing* space" and the "cost of space" (which was the phrase the House

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[25] S. 652, § 204(e)(2)(A)-(B) (as passed by Senate, June 15, 1995) (emphasis added). *See* Attachment 5 hereto.

[26] This version also shows that the Senate contemplated that the Commission would use an allocation of the sum of two different sets of costs in establishing telecom rates – one based on the "cost of providing space" and the other on the "cost of space." S. 652, § 204(e)(2)(A)-(B) (as passed by Senate, June 15, 1995). Although neither term was defined in the Senate bill, the reference to these two different cost concepts in the same formula indicates that the Senate did not equate the two phrases. *See supra* note 16 regarding statutory construction principles.

[27] Conference Report at 207, 1996 U.S.C.C.A.N. at 221.

[28] The Florida Utilities misinterpret this legislative history in explaining that, "[c]ommenting on the language ultimately included as section 224(e), the Conference Report states: 'The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula.'" Florida Utilities Comments at 61-62. Of course, the language mistakenly quoted by the Florida Utilities above referred to the *rejected* House language that based rates on "fully allocated cost." Contrary to this assertion, the House bill language was never "ultimately included as section 224(e)" – instead, the Senate provision was adopted. *See also* Oncor Comments at 62-63 (erroneously citing H. Rep. No. 104-458, at 206 and the Conference Report for the proposition that Congress intended the Telecom Rate to use "fully allocated costs"). Significantly, none of the other electric utility industry commenters assert this interpretation of the legislative history, recognizing that the Conference Report undercuts the argument that Congress intended to require use of fully allocated costs.

consistently used for its fully allocated cost approach), it is significant that the agreed upon language in 224(e)(2) settles on allocating the "cost of *providing* [unusable] space." Congress intended that there be a difference between these phrases and implicitly rejected the House's mandatory fully allocated cost approach in favor of a more nuanced approach that relied upon the Commission's ratemaking expertise to establish rates based on costs consistent with the objectives of the Communications Act.[29] This preference for Commission involvement in crafting the appropriate attachment rate methodology (as opposed to the rejected House mandate to use fully allocated costs) is seen in the Conference Report's explanation that "Section 204 [in the Senate bill] further requires the Commission to prescribe additional regulations to establish rates for attachments by telecommunications carriers."[30]

Congress' rejection of the proposed House mandate to use fully allocated costs provides a "strong indication" that Congress did not intend to so bind the Commission. In *Cable Investments, Inc. v. Woolley*, the Third Circuit rejected a cable operator's claim for mandatory access to apartment building residents finding "guidance in the legislative history of section 633."[31] In an earlier version of the bill, Section 633 had included a mandatory access provision. However, that provision was deleted and did not appear in the law as adopted by Congress. As the Third Circuit explained:

> What is significant for our purposes is that section 633 was dropped from the bill that was passed by Congress. The fact that section 633 was not part of the Act as it ultimately emerged from Congress is a strong indication that Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable service to apartment dwellers.[32]

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[29] *See Estate of Cowart*, 505 U.S. at 496-97 (concluding that "[t]he fact that Congress chose to use different terms [in the same section of a statute] surely indicates that Congress intended the two terms to have different meanings"). *See also* authorities cited in note 16 *supra*.

[30] Conference Report at 206, 1996 U.S.C.C.A.N. at 220.

[31] 867 F.2d 151, 155 (3d Cir. 1989).

[32] *Id.* at 156 (*citing Russello,* 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Thompson v.*

Likewise, the fact that Congress specifically rejected the House provision that sought to require the Commission to use fully allocated costs in the telecom pole rate formula in favor of the Senate provision, strongly supports the Commission's conclusion that it has the authority to define "cost of providing space" to exclude capital costs.[33]

D. The Text and Legislative History of Section 224(e) Do Not Require That the Telecom Rate be Different or Higher Than the Section 224(d) Rate

The plain text of the 1996 Act and its legislative history also show that Congress did not mandate that the telecom pole rate be "different" or "higher" than the cable pole rate.[34] Congress anticipated a variety of possible outcomes depending on how 224(e)(2) "costs" were defined by the Commission under its broad ratemaking authority, how many attachers might emerge over time,[35] and whether the Commission would exercise its authority to reduce the cable rate.[36] Any number of possible pole rent approaches adopted by the Commission had the potential to produce a telecom pole rate higher than the cable rate – including its initial decision to use fully allocated costs in the telecom rate formula.[37] The fact that Congress established a 5-year phase-

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Kennickell, 797 F.2d 1015, 1024-25 (D.C. Cir. 1986) (finding deletion of provision to contribute to evidence of congressional intent).

[33] Some utilities argue that the Commission is bound by ratemaking principles to include capital costs and rate of return in establishing the telecom rate. *See* Florida Utilities Comments at 66-68. This is incorrect, as there are many examples of agencies lawfully establishing rates that exclude these elements. *See Verizon*, 535 U.S. at 498-99 ("[E]ven when we have dealt with historical costs as a ratesetting basis, the cases have never assumed a sense of 'cost' as generous as the incumbents seem to claim."). *See also Strickland*, 48 F.3d at 19-22 (upholding agency regulations excluding depreciation from the ambiguous term "cost"); *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986) (the ICC had authority to decide the compensation Amtrak would pay to use railroad tracks, but such compensation was limited to "incremental costs"). Similarly, the rate range permitted by Section 224(d) would allow for rates as low as marginal cost, which would exclude even more costs than the Commission's proposal.

[34] *See, e.g.*, EEI/UTC Comments 68-73; Oncor Comments at 60; Utility Alliance Comments at 83-85; Florida Utilities Comments at 59-60.

[35] As explained in Comcast's earlier comments, Congress expected that there would be a growing number of competitive attaching entities following the passage of the 1996 Act. *See* Comcast Comments at 7.

[36] Congress had to anticipate the possibility that the cable rate might be reset by the Commission to incremental cost which would mean the telecom rate would always be the higher rate.

[37] In this regard, utility references to Commission and court decisions acknowledging that the telecom rate is "higher" than the cable rate do not establish that Section 224(e) *required* a higher telecom rate. These Commission and court statements were simply accurate characterizations of the mathematical result flowing from the

in period to begin after the effective date of the Commission's regulations for any possible telecom attachment rate increase simply reflects Congress' effort to moderate the impact of potential rate increases given these variables. The Commission's own regulations also anticipated that the telecom rate formula might result in rates lower than the cable rate (upon their initial effective date or in the future) and required any such decrease to become effective immediately.[38]

E. The Commission's Proposal is a Well Reasoned Response to Congress' Broadband Deployment Directives

Several utilities argue that the proposed "sudden" departure from the longstanding practice of applying fully allocated costs in the telecom pole rate formula has not been adequately explained and is therefore arbitrary and capricious.[39]

As previously demonstrated, the Commission's telecom rate proposal is consistent with the text and legislative history of Section 224. Given the ambiguity regarding the "costs" to be used in the telecom formula,[40] and the broad methodological leeway accorded ratemaking agencies to fill in such statutory gaps, the Commission is authorized to interpret the provision in a manner that will promote the goals of the Act. Congress wisely left this ratemaking determination to the Commission's discretion.[41]

Commission's initial decision to use fully allocated costs in the telecom rate formula. *See, e.g.*, Florida Utilities Comments at 59-60; Oncor Comments at 63; EEI/UTC Comments at 65. Similarly, the Florida Utilities rely on an isolated statement in a Commission brief (not relevant to the issue in the case) for the proposition that Section 224(e) requires a higher rate. Florida Utilities Comments at 60. This reliance is misplaced. It is well established that agency briefs such as this are not entitled to any particular deference by the courts. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Fogg v. Ashcroft*, 254 F.3d 103, 109 (D.C. Cir. 2001) (an agency brief is "not the product either of formal adjudication or notice-and-comment rulemaking" and is not entitled to *Chevron* deference).

[38] 47 C.F.R. § 1.1409(f) ("Rate reductions are to be implemented immediately.").

[39] *See, e.g.*, Utility Alliance Comments at 92-93 (courts require articulation of "a rational connection between the facts found and the policy choice made" and there is no reasoned analysis to support the choice to suddenly exclude capital costs); Florida Utilities Comments at 66-68; EEI/UTC Comments at 67.

[40] The courts have recognized that "[t]he Act sets forth fairly general rules regarding allocations of the cost of usable and unusable space for attachments." *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002).

[41] *Permian Basin*, 390 U.S. at 790.

The American Recovery and Reinvestment Act of 2009,[42] Section 706 of the 1996 Act,[43] and the National Broadband Plan[44] all justify the Commission's proposal to eliminate unnecessary capital costs from the telecom pole rate formula in order to promote broadband investment, adoption and competition.[45] Lowering the telecom rate as proposed will promote these key objectives, consistent with Section 224, while ensuring that utilities are more than fully compensated.[46]

Finally, several utilities argue that the Commission's proposal to reduce pole costs is arbitrary because reducing those costs will not achieve the goal of expanding broadband deployment.[47] Such utility claims are completely out of touch with the record in this proceeding.[48]

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[42] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[43] Section 706(a) of the 1996 Act, reproduced in notes under 47 U.S.C. § 157 ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment.").

[44] Federal Communications Commission, Connecting America: The National Broadband Plan (2010).

[45] As explained later, the utilities have failed to provide any evidence (as specifically requested by the Commission) identifying capital or operating expenses that are not recovered through make-ready and recurring rents. *See* discussion at pp. 16-19 *infra.*

[46] Several utilities point to earlier Commission rulemaking decisions and current Commission rules that include capital costs in the telecom rate formula carrying charges. *See, e.g.*, Utility Alliance Comments at 94-96; Oncor Comments at 63-64. These prior decisions do not take away from the Commission's authority to promote the goals of the Act by eliminating capital costs as proposed. Significantly, the Commission's rules describe the current carrying charges as reflecting the "cost of *owning* a pole" not the Section 224(e)(2) standard of the "cost of providing space" on a pole. 47 C.F.R. § 1.1404(g)(1)(ix). Congress did not dictate that the telecom rate formula reflect the "cost of owning a pole" and left it to the Commission to define the "cost of providing space." *See also* Florida Utilities Comments at 66-67 (*citing* 1997 Commission NPRM describing carrying charges as the "costs incurred by the utility in owning and maintaining poles . . . ."). While such a cost approach might support a fully allocated cost methodology if Congress had directed it, Section 224(e)(2) does not – it contemplates the undefined "cost of providing space" on a pole.

[47] *See, e.g.*, Oncor Comments at 3 (asserting that the "record is utterly devoid of any proof that so-called barriers to pole access are causing the few unserved areas to remain without access to broadband services. There certainly is no evidence that areas unserved by broadband companies are having difficulty accessing the poles owned by Commission regulated pole owners.").

[48] For example, Oncor contends that most poles are not subject to Commission regulation and therefore rate uniformity cannot be achieved. Oncor Comments at 58-59. *See also* EEI/UTC Comments at 11-12. Of course, pole rates in most certified states have long been subject to a unified rate based on the Commission's cable rate formula. In addition, filings by cooperatives and municipal utility interests stress that whatever the Commission decides will have a strong influence on pole rates charged by these exempt utilities. *See, e.g.*, Comments of the American Public Power Association at 3-4 ("APPA Comments"); Comments of the National Rural Electric Cooperative Association at 6-7.

With regard to deployment issues, the National Broadband Plan found that

> nearly 100 million Americans do not have broadband today. Fourteen million Americans do not have access to broadband infrastructure that can support today's and tomorrow's applications. More than 10 million school-age children do not have home access to this primary research tool used by most students for homework.[49]

Moreover, the Commission recently concluded that between 14 and 24 million Americans do not have access to broadband today and notes the key role that this pole proceeding plays in fulfilling the Commission's obligation "to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment . . . ."[50]

The Commission has determined in both the National Broadband Plan and in this proceeding that increased pole attachment costs and other access issues materially interfere with achieving the national goals of greater broadband deployment, adoption and competition.[51] Comments in this proceeding, including those by pole owning entities, recognize the negative impact that higher pole costs have on these critical objectives. For example, CenturyLink (a pole owner) supports the Commission's proposal to adopt the cable rate for all attachers:

> High attachment rates unquestionably discourage investment. . . . They handicap investment and network upgrades in all areas by leaving fewer dollars available for actual infrastructure investment.
>
> . . . .
>
> High attachment rates inevitably lead to higher broadband prices, hurting affordability for consumers. That necessarily reduces adoption of broadband services.
>
> . . . .

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[49] NBP at 19.

[50] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Sixth Broadband Deployment Report, FCC 10-129, 24 FCC Rcd. 9556 ¶¶ 7, 8 & nn.26, 29 (2010). The Supreme Court has also upheld the Commission's application of the cable rate formula for commingled cable attachments to promote "Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and . . . 'to accelerate deployment of such capability by removing barriers to infrastructure investment." *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).

[51] For example, the NBP estimated that pole attachment leasing costs increase fiber deployment expense by 20%. NBP at 109.

> The Pew Foundation's latest study confirms that more than one in five people who are not yet online cite cost as their principal reason.
>
> . . . .
>
> [Lowering rates by] "reinterpreting the telecom rate to a lower level consistent with the Act" . . . will expand promote competition [sic], increase investment, and promote affordability and adoption." [Increasing rates to the telecom level would frustrate] the Commission's goals by leading to "increased broadband prices and reduced incentives for deployment."[52] (Citations omitted.)

There is no serious basis for the utilities' arguments that the Commission has failed to provide a reasoned analysis of its rate proposal or that the proposal is not sufficiently supported by the record in this proceeding.

F. The Commission Should Reject Utility Proposals to Increase Pole Rates for Broadband

A number of utilities persist with the long-discredited claim that the cable television pole rate formula subsidizes attachers.[53] This contention was thoroughly refuted in earlier stages of this proceeding.[54] To this day (and for the many decades they have espoused this position), the utilities have not produced *any* substantive evidence or offered *any* expert economic testimony to support their claim. The fact remains that under the cable rate formula pole owners are reimbursed for all marginal costs arising from a third party attachment through make-ready and then receive recurring rent payments based on their fully allocated costs. As the FNPRM

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[52] CenturyLink Comments at 9-15. *See also* Comments of Verizon at 10-11 (supporting cable rate formula to promote broadband deployment). As the Commission explained in the FNPRM, nonuniform pole rates have also caused excessive litigation which poses an obstacle to increased broadband investment and competition. FNPRM ¶¶ 115-117. *See also* NBP at 110-11.

[53] *See, e.g.*, EEI/UTC Comments at 74-77; Utility Coalition Comments at 115-19; Utility Alliance Comments at 78-79.

[54] *See, e.g.*, Comcast Comments at 15-21; Comments of Comcast Corporation submitted March 7, 2008, at 12-24 ("Comcast March 2008 Comments"); Reply Comments of Comcast Corporation submitted April 22, 2008, at 3-8 ("Comcast April 2008 Reply Comments"). Even other pole owners and their consultants disagree with the utility position. *See* Comments of AT&T, Inc. submitted March 7, 2008, at 18-21 (discussing how excessive electric utility costs are included in formula resulting in supra compensatory rates); Reply Comments of Mahanger Consulting Associates submitted September 13, 2010, at 7-25 ("Mahanger Reply Comments") (pole owners' costs overstated under current FCC methodology).

recognizes, for decades the courts have found that pole owners are more than fully compensated under this arrangement.[55]

Despite these findings, utilities now request that the Commission establish a rate even higher than the current telecom rate for all broadband attachments.[56] In support, the utilities repeat arguments already addressed and previously rejected by the Commission on numerous occasions (e.g., reallocate the safety space from usable to unusable).[57] EEI/UTC even suggests that the Commission should allow utilities to begin to charge rent on overlashing as a separate attachment, thereby reversing a key Commission policy that has facilitated the deployment of broadband over the past two decades.[58] As explained in earlier comments, these proposals are contrary to existing precedent and would constitute a massive step backwards in achieving the objectives of the Act and National Broadband Plan.[59]

Another utility claims that "[c]ommunications attachers demonstrably add significantly to electric utility capital expenditures"[60] rendering the current (and the proposed) pole rate formulas noncompensatory. The FNPRM noted this utility claim, which appears repeatedly in earlier comments, and solicited specific factual support from the electric industry to verify the claim.[61] The Commission invited "parties to submit studies that isolate and quantify the effect of third-

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[55] *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) ("[A]ny implementation of the [FCC cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"). *See also* Comcast Comments at 16 n.46 (discussing states that have a legal obligation to protect the interests of both utility and communications consumers and that have decided that the cable rate formula is just and reasonable and does not constitute a subsidy).

[56] *See, e.g.*, EEI/UTC Comments at 74-78; Utility Coalition Comments at 126 ("A rate higher than the Telecom rate for more than telecom services would provide a much fairer allocation of costs and eliminate the subsidies for cable operators and CLECs alike.").

[57] EEI/UTC Comments at 75; Utility Alliance Comments at 79.

[58] EEI/UTC Comments at 78. *See also* Utility Alliance Comments at 79.

[59] *See* Comcast March 2008 Comments, Appendix 1 (Appendix of Commission Authority Rejecting Miscellaneous Utility Rate Increase Arguments) at 3-5, 6-9.

[60] Utility Coalition Comments at 109. *See also* EEI/UTC Comments at 70 ("[T]here are a number of costs that utilities incur to accommodate third-party attachments that are not accounted for by the FCC.").

[61] FNPRM ¶ 136.

party attachment demand on pole height and therefore pole investment."[62] While EEI/UTC anticipated "that individual utilities may provide [the Commission] greater details regarding the additional capital costs they incur outside the make-ready process solely to accommodate third party attachers,"[63] that did not occur. *The entire electric utility industry declined the Commission's invitation to provide the requested data.* The Utility Coalition could provide only conclusory statements from utilities that they "install poles that are taller than they would need for their own purposes if they were the only attacher."[64]

The failure of the entire electric utility industry to provide any study or information supporting its claim of unreimbursed capital and other operating expenses[65] compels the rejection of the utilities' speculative and wholly unsupported contentions. The record lacks any evidence demonstrating that such additional costs or expenses in fact exist.[66]

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[62] *Id.* The FNPRM explained that it would expect such a study to:

> separately quantify the additional investment in taller poles made in anticipation of third party communications attachers that was not recovered in make-ready fees and the additional investment in taller poles that was recovered in make-ready fees. In that regard, it would be useful if the study calculates the additional investment required to accommodate third-party attachers on a per pole basis and on a per pole per attacher basis. Finally, the study should describe the analytical techniques used, as well as what data was sampled.

Id. n.371.

[63] EEI/UTC Comments at 70.

[64] Utility Coalition Comments at 109. The Utility Coalition surveyed all its nine members for this information but apparently only four responded. *See also* APPA Comments at 15. The APPA also provides a conclusory assertion that its members purchase taller poles than they would if they were the only attacher but does not provide any of the data sought by the Commission.

[65] The FNPRM made a similar request for an electric utility study with regard to the existence of any additional operating costs incurred as a result of third party attachments. FNPRM ¶ 138 n.377.

[66] *See Knology v. Georgia Power Co.*, Memorandum Opinion & Order, FCC 03-292, 18 FCC Rcd. 24615 ¶ 39 (2003) (Commission rejects electric utility claim as speculative where the utility failed to produce any evidence that grandfathered pole attachments on its poles are out of compliance with current safety standards. "Georgia Power's contentions are based purely on speculation . . . . The record is devoid of evidence demonstrating the existence of such a problem."). Moreover, in any pole complaint proceeding the "utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate." 47 C.F.R. § 1.1409(b). In addition, those Commission regulations provide that "[w]here one of the parties has failed to provide information . . . requested by the Commission . . . [it] may decide adversely to [the] party who has failed to supply requested information . . . ." 47 C.F.R. § 1409(a). *See also Georgia Power Co. v. Teleport Comm.*, 346 F.3d at 1039 ("Georgia Power did not come close to meeting its burden to explain the methodology and information underlying its pole attachment rate.").

While there is no evidence to support utility claims that they incur unreimbursed capital and operating costs from attachments, there is substantial evidence in the record demonstrating that no such unreimbursed costs exist. For example, the Florida Utilities group whose six participating electric utilities own over 2.7 million distribution poles[67] explains that electric utilities install taller poles than they would otherwise need because of the requirements of decades old joint use agreements with ILECs.[68] Additionally, the record shows that the FERC cost accounts that are used to calculate pole carrying charges substantially overstate pole-related costs thereby generating excessive pole rents for utilities.[69] The inclusion of such significant excess costs in pole rents more than compensates electric utilities for any incidental capital or operating costs (to the extent that any in fact exist) in the highly unlikely event they are not directly recovered in make-ready and rents.[70]

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[67] Florida Utilities Comments at 8-10.

[68] *Id.* at 73 ("[I]t is because of joint use agreements that electric utilities have built networks of taller poles (often at least 35-40 foot poles)."]. Joint use agreements also explain the limited data provided by the Utility Coalition because the electric utilities would typically expect their poles to have a joint use attacher. Another reason electric utilities install taller poles is because "voltages carried on poles [have] increased and the electric industry graduated from cross-arm to vertical construction [thereby creating] an ongoing need for taller and taller poles..." Mahanger Reply Comments at 6. *See also* Comcast Comments, Pecaro Declaration ¶¶ 16-17 ("The utility, however, provides poles that are of a height that are suitable and necessary solely for the utility's needs... Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility's capital preservation obligations, to risk nonrecovery of these costs absent a direct economic benefit.").

[69] *See, e.g.*, Comcast Comments, Pecaro Declaration ¶¶ 23-26; Comments of the NCTA at 18-25; Mahanger Reply Comments at 13-16. Mahanger explains that including investment in poles over 40 feet tall "produces an overstated cost that does not equate with the true blended pole." In addition, Mahanger observes that "[a] close examination of account 593 [FERC maintenance account] . . . indicates that many of the cost inclusions in this account are associated not with the maintenance of poles but with maintenance of the electric company's overhead lines."

[70] The electric utility industry's efforts to inflate its pole revenue by millions of dollars at the expense of third party attachers (and to the detriment of the Commission's broadband deployment initiatives) even extends retroactively. Oncor complains that the FNPRM rate proposal would be unfair because Oncor has "reserved its rights through letters of reservation to collect what would have been paid under the existing Telecom Rate should the FCC classify VOIP as a broadband service and make it subject to the proposed Telecom Rate." Oncor is concerned that the Commission's proposal could "significantly impair" Oncor's ability to collect millions of dollars of such retroactive rent payments that it purports it would be owed (plus interest). Any effort by electric utilities to reserve rights to collect a higher pole rent retroactively for periods during which VoIP was an unclassified information service would be unlawful. Under the Supreme Court's *Gulf Power* decision, broadband services (including broadband applications such as VoIP) carried by cable systems are entitled to the cable rate formula under the Commission's existing regulations. Although the Commission is considering whether to classify VoIP as a telecom service in a pending proceeding, any such classification can only have prospective effect with regard to pole attachment rates.

III. THE SIGN AND SUE RULE SHOULD BE RETAINED WITHOUT MODIFICATION

As most utilities will acknowledge, the relationship between attachers and pole owners is largely successful and it is rare that either party will seek Commission intervention.[71] Likewise, there have been very few situations requiring Commission involvement under the "sign and sue" policy. This is because the existing policy provides attachers with the necessary negotiating leverage to resolve issues informally without the need to bring the matter to the Commission. The proposal to modify the sign and sue rule by requiring advance written notice of all contract objections prior to execution will bring the contract process to a standstill, increase disputes at the Commission, and undermine the pole attachment regulations as well as the Commission's broadband objectives.

The FNPRM recognizes that "[t]he record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule."[72] Several utilities in this proceeding openly admit to routinely including provisions in their pole agreements that the Commission ruled unlawful years ago.[73]

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[71] *See, e.g.*, Utility Coalition Comments at 88, 90 ("The vast majority of attachment disputes are resolved amicably without Commission intervention."); *id.* at 92 ([Relationship between attachers and pole owners] "to date has worked remarkably well . . . ."); CenturyLink Comments at 39 (reporting that most attachment issues resolved amicably).

[72] FNPRM ¶ 104.

[73] Oncor Comments at 30 (Oncor proclaims that, for over 10 years, its "procedures require up-front payment of make-ready charges." However, in 2003, the Commission ruled that such up-front payments were unreasonable. *Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd. 16333 ¶ 20 (2003) ("[W]e find to be unreasonable Georgia Power's up-front make-ready fee . . . ."). *See also* Utility Coalition Comments at 77-78 ("The standard practice among Coalition members and most other utilities is to require payment for customer construction projects in advance . . . ."); Comments of Time Warner Cable Inc. at 26-27 (recounting various experiences with utilities over pole agreements that flatly violate longstanding Commission rules (e.g., requiring permitting for overlashing)). Significantly, the TWC disputes did not end up at the Commission largely because the utilities know that the Commission will not enforce such unlawful provisions.

CenturyLink (a pole owner) supports the existing Commission rule without modification because "the policy reflects the reality that an attacher may have no choice but to accept an unreasonable or discriminatory contract term in order to gain access."[74] CenturyLink explains:

> Attachers' negotiating leverage is limited. When rolling out expensive, time-sensitive build-outs or plant upgrades, an attacher may be unable to withstand protracted negotiations or litigation necessary to ensure just and reasonable rates, terms, and conditions. . . . Such contracts often contain rates, terms, or conditions that deviate from the Commission's rules.[75]

If ILECs that control their own pole assets (that electric utilities often rely on) cannot combat the unreasonable boilerplate terms that show up routinely in pole agreements, any diminishment or conditioning of the existing sign and sue policy will place other attachers in a far more precarious position.[76]

In light of the continued superior bargaining power of pole owners, the lack of complaints at the Commission generated by sign and sue, the ability of the Commission to address legitimate *quid pro quo* issues under current policy, and the recent endorsement of the policy by the courts, modifying the sign and sue policy is unjustified and places effective federal pole attachment regulation at significant risk.[77]

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[74] CenturyLink Comments at 35.
[75] *Id.* at 35-36.
[76] Even the electric utilities who urge the Commission to eliminate the sign and sue policy entirely recognize the plight faced by attachers with no leverage against pole owners. As explained by the Utility Coalition, if ILECs were given Section 224 rights, ILEC negotiating leverage would increase against electric companies and ILECs "could restrict electric utility access to ILEC poles and demand that electric utilities pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles, replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations, surrender space needed for electric attachments, and otherwise hinder the ability of electric utilities to provide service to their customers in a safe and reliable manner." Utility Coalition Comments at 152. These are the very tactics that pole owners use in negotiating pole agreements that make it essential that the current sign and sue rule remain in place.
[77] See more detailed discussion of these issues in Comcast's Comments at 25-30.

IV. THE COMMISSION'S EXISTING UNAUTHORIZED ATTACHMENT POLICIES GUARD AGAINST WELL DOCUMENTED UTILITY ABUSES

The comments make it clear that without the current Commission restrictions on unauthorized attachment penalties, utilities will abuse their monopoly power over the poles in imposition of such penalties. Pole owner CenturyLink explains:

> Creating a penalty system creates an incentive for pole owners to find and impose penalties as a revenue enhancement, and could needlessly multiply disputes... Failure to pay a disputed "penalty" could lead to threats of termination of the attachment agreement and ultimately to threats of attachment removal, risking delivery of service to the public.

Bright House describes a situation where the utility's consultant determined that Bright House had over 23,000 unauthorized attachments and the utility sought some $4 million in back rent and interest.[78] However, the utility's counting methodology ignored the requirements of the pole attachment agreement, unilaterally imposed new (and improper)[79] attachment counting standards, counted other parties' attachments as belonging to Bright House (in areas the cable operator did not even serve) and failed to tie alleged unauthorized attachments to actual attachments in the field.[80] In the *Mile Hi Cable Partners* case, a predecessor of Comcast was unlawfully assessed over $6 million by the utility for 25,000 purported unauthorized attachments, the vast majority of which the Commission and courts both agreed were not unauthorized at all.[81]

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[78] Significantly, the utility simply ignored well-settled Commission policy limiting back rent to five years and sought eight years of back rent and applied interest at 18 percent! Comments of Bright House at 32 n.49.
[79] For example, the utility counted the one foot of space between attachments as yet another attachment requiring rent. *Id.* at 30. This apparently resulted in some 10,000 "empty space" attachments classified as "unauthorized."
[80] *Id.* at 31. Often, utilities will simply take the difference between the erroneous number the contractor counts during an audit and the number billed to the attacher for the last year. Of course, this approach makes it virtually impossible to contest unauthorized attachment findings on a pole by pole basis regardless of how meticulous the attacher's records are kept.
[81] *Mile Hi Cable Partners, LP*, Order, 17 FCC Rcd. 6268 (2002), *aff'd, Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

Similarly, when the Oregon PUC initially established maximum unauthorized attachment penalties of up to 30 times annual pole rent in response to utility complaints, utilities promptly abused the rules by "discovering" massive numbers of alleged "unauthorized attachments" and demanded millions of dollars in penalties from attachers.[82] Oregon quickly returned to a system similar to the FCC's 5-year back rent approach.[83]

Pole owners themselves confirm that the working relationship among utilities and attachers is generally successful and that most issues are resolved in the field. Comcast agrees with this assessment and that the Commission should not change the current policy protecting attachers from unreasonable unauthorized attachment penalties.

V. MAKE-READY AND POLE CHANGE-OUTS DO NOT CONSTITUTE "EXPANDING CAPACITY"

A few electric utilities mistakenly argue that they have no obligation to rearrange their own facilities to accommodate new communications attachments because to do so would constitute "expanding capacity." For example, the Utility Alliance states that rearrangement of facilities on a pole violates an electric utilities' right to deny access based on "insufficient

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[82] *See, e.g.*, Comments of Charter Communications at 28-32 ("Charter Comments"); CenturyLink Comments at 39. The Utility Coalition asserts that "[e]lectric utilities have no reason to fabricate claims of pole loading, clearance violations, or any other unsafe conditions. . . . Worker safety and the integrity of the pole line and the reliability of the electric system are at the heart of the electric utility concerns." Utility Coalition Comments at 98. Of course, the utilities have the very same demonstrated financial incentive to fabricate and exaggerate such safety related claims as with unauthorized attachments. By imposing unjustified pole rearrangement and replacement costs on third party attachers that are actually the pole owner's responsibility, the pole owner conserves its own capital. Comcast April 2008 Reply Comments, Exhibit 3 (Harrelson Declaration) ¶¶ 15-19. These improper incentives become transparent when electric utility commenters oppose creating an exception for imposing safety related penalties on attachers for violations shown to be caused by the electric utility itself. *See* EEI/UTC Comments at 58-59.

[83] *See* Comcast Comments at 38; Charter Comments at 29-30. The Florida Utilities argue that the current unauthorized attachment problem is of the "Commission's own making" because the Commission will not allow utilities to enforce the one-sided, abusive enforcement provisions in utility contracts. Florida Utilities Comments at 50. The utilities have it backwards – it is utility abuse of the enforcement process that compelled the Commission to curb utility abuses in the first place (and history repeats itself in Oregon). Giving utilities a free hand (and an increased financial incentive) will only exacerbate the persistent problem of unjustified unauthorized attachment claims.

capacity."[84] Similarly, the Florida Utilities argue that, "[i]f the proposed rules are intended to require rearrangement of electric facilities in the supply space, this expansion of Commission regulation is at odds with previous binding interpretations of section 224(f)(2) and an electric utility's right to deny access where there is insufficient capacity for the new attachment."[85]

The FNPRM refutes these interpretations of Section 224(f)(2) and the Commission should reiterate that performing make-ready does not constitute an expansion of capacity within the meaning of Section 224.[86] Moreover, the Commission should clarify that utilities do not have the right to *unilaterally* declare that there is "insufficient capacity" on a pole under Section 224. As recognized by the FNPRM, the Eleventh Circuit has ruled that Congress did not intend to place such power in the hands of utilities – a utility and attacher must "agree" that no capacity exists on a pole.[87]

VI. ILEC POLE ACCESS RIGHTS ARE SUPERIOR TO THE RIGHTS OF OTHER ATTACHERS – JUSTIFYING HIGHER ATTACHMENT RATES

The FNPRM sought additional comments regarding ILEC efforts to obtain the protections of Section 224, including regulated pole attachment rates.[88] To the extent that the Commission decides that ILECs are entitled to Section 224 rights, it is imperative that the advantages ILECs have under their joint use agreements be considered in determining an appropriate just and reasonable rate. For example, the Utility Coalition reconfirms that

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[84] Utility Alliance Comments at 31-33. *See also* Comments of Ameren Services Co., CenterPoint Energy Houston Electric, LLC, and Virginia Electric & Power Co. at 7.
[85] Florida Utilities Comments at 13.
[86] *See* FNPRM ¶ 16 n.56.
[87] *See Southern Co.*, 293 F.3d at 1347-48 ("[Utilities'] construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act's text."). *See also* Comcast Comments at 26 n.79. A related issue involves the Commission's determination in its Order that pole change outs constitute an "expansion of capacity" and are not required by Section 224. This conclusion is erroneous and should be reversed on reconsideration. *See* Comcast Corporation's Petition for Reconsideration or Clarification of the Alabama Cable Telecommunications Association in WC Docket No. 07-245 and GN Docket No. 09-51, filed September 2, 2010.
[88] FNPRM ¶ 143.

"permitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs. . . ."[89] A "non-exclusive" list of these ILEC advantages includes:

- Paying significantly lower make-ready costs;
- No advance approval to make attachments;
- No post-attachment inspection costs;
- Rights-of-way often obtained by electric company;
- Guaranteed space on the pole;
- Preferential location on pole;
- No relocation and rearrangement costs; and
- Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.[90]

Although no ILECs have contested the Utility Coalition's assessment regarding the superior rights that ILECs enjoy compared to other third party attachers, AT&T recently responded to Comcast's earlier discussion regarding these joint use advantages.[91] In general, AT&T does not so much demonstrate that ILECs do not enjoy substantial pole attachment advantages as complain that these advantages have diminished somewhat over time, and that they vary among the ILECs (e.g., comparing use of pole space by Verizon's FiOS to AT&T's U-verse technology).[92] In the absence of a comprehensive analysis of each joint use and joint ownership arrangement it is impossible to document the precise advantages enjoyed by each ILEC – although it is incontestable that many advantages do exist. Consequently, the proposal

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[89] Utility Coalition Comments at 134.
[90] *Id.* at 134-38.
[91] AT&T Comments at 12-19.
[92] In any event, AT&T's response does not adequately address Comcast's observations (or those of the Utility Coalition). For example, AT&T erroneously asserts that it is somehow subsidizing third party attachers. *Id.* at 13. The record in this proceeding, and AT&T's own expert, establishes that cable and other attachers' payment of both make-ready and rent for pole attachments does not constitute a subsidy. *See* AT&T April 2008 Reply Comments, Declaration of Veronica MacPhee ¶ 41 ("The Commission should not be persuaded by the spurious arguments of the ELCOs, which continue to insist that they are somehow subsidizing other pole users. Quite the reverse is true."). AT&T's complaint really seems to be that its contractual arrangements with electric companies do not always allow it to receive a share of rent payments that the electric company receives from attachers. In addition, AT&T suggests that it does not see the advantage of not paying costs to avoid "displacement" on a pole. As the Utility Coalition explains, the ILECs' guaranteed space at a preferential location on the pole represents a "unique benefit." *See* Utility Coalition Comments at 34.

of the National Cable and Telecommunications Association to allow ILECs to opt-in to third party pole agreements would be a practical solution that would leave the assessment of the advantages and disadvantages to the ILECs themselves.

CONCLUSION

The Commission should adopt its proposed telecom pole rate formula, which will advance key national broadband objectives by lowering and unifying pole attachment rates consistent with recommendations in the National Broadband Plan. The proposal is well within the statutory authority traditionally conveyed to ratemaking agencies. Moreover, the text and legislative history of Section 224 make it clear that Congress rejected any required use of fully allocated costs in the Commission's regulations. The comments also confirm that the Commission should neither modify its existing, judicially approved "sign and sue" policy nor dilute existing protections against abusive unauthorized attachment penalties. Further, the Commission should reaffirm that performing make-ready does not constitute "expanding capacity" and that pole owners do not have the right to unilaterally determine when there is "insufficient capacity" on a pole. Finally, the record clearly shows that ILEC pole attachment rights are superior to CLEC and cable attachers and that any extension of Section 224 rights to ILECs must reflect this competitive disparity in establishing equitable pole attachment rates.

Respectfully submitted,

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October 4, 2010

ATTACHMENT 1

Union Calendar No. 105

104TH CONGRESS
1ST SESSION

H. R. 1555

[Report No. 104–204, Part I]

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1995

Mr. BLILEY (for himself, Mr. DINGELL, Mr. FIELDS of Texas, Mr. MOORHEAD, Mr. OXLEY, Mr. BILIRAKIS, Mr. SCHAEFER, Mr. BARTON of Texas, Mr. HASTERT, Mr. STEARNS, Mr. PAXON, Mr. GILLMOR, Mr. KLUG, Mr. GREENWOOD, Mr. CRAPO, Mr. FRISA, Mr. WHITE, Mr. COBURN, Mr. TAUZIN, Mr. HALL of Texas, Mr. BOUCHER, Mr. MANTON, Mr. TOWNS, Ms. ESHOO, and Mrs. LINCOLN) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

JULY 24, 1995

Reported from the Committee on Commerce with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

Referral to the Committee on the Judiciary extended for a period ending not later than July 24, 1995

Additional sponsors: Mr. DEUTSCH, and Mr. COX of California

Committee on the Judiciary discharged, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on May 3, 1995]

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such regulations identified pursuant to paragraph (1); and

(B) submit to the Congress a report containing the recommendations required by paragraph (1)(C).

SEC. 105. POLE ATTACHMENTS.

Section 224 of the Act (47 U.S.C. 224) is amended—

(1) in subsection (a)(4)—

(A) by inserting after "system" the following: "or a provider of telecommunications service"; and

(B) by inserting after "utility" the following: ", which attachment may be used by such entities to provide cable service or any telecommunications service";

(2) in subsection (c)(2)(B), by striking "cable television services" and inserting "the services offered via such attachments";

(3) by redesignating subsection (d)(2) as subsection (d)(4); and

(4) by striking subsection (d)(1) and inserting the following:

"(d)(1) For purposes of subsection (b) of this section, the Commission shall, no later than 1 year after the date of enactment of the Communications Act of 1995, prescribe

regulations for ensuring that utilities charge just and reasonable and nondiscriminatory rates for pole attachments provided to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services (as defined in section 3 of this Act). Such regulations shall—

"(A) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments;

"(B) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and

"(C) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.

"(2) The final regulations prescribed by the Commission pursuant to paragraph (1) shall not apply to a cable television system that solely provides cable service as defined in section 602(6) of this Act; instead, the pole attachment rate for such systems shall assure a utility the recovery of not less than the additional costs of providing pole attach-

ments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

"(3) Whenever the owner of a conduit or right-of-way intends to modify or alter such conduit or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.".

SEC. 106. PREEMPTION OF FRANCHISING AUTHORITY REGULATION OF TELECOMMUNICATIONS SERVICES.

(a) TELECOMMUNICATIONS SERVICES.—Section 621(b) of the Act (47 U.S.C. 541(c)) is amended by adding at the end thereof the following new paragraph:

"(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

ATTACHMENT 2

104TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 104–204
1st Session } { Part 1

COMMUNICATIONS ACT OF 1995

JULY 24, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1555]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 1555) to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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92–414

that such information would have to be able to be disclosed only to those persons who have the approval of the customer. Thus, the Committee intends that the use of "aggregate information" would be rather limited or restricted.

Section 222(c) states that this section shall not prevent the use of CPNI to combat toll fraud or to bill and collect for services requested by the customers.

Section 222(d) allows the Commission to exempt from its requirements of subsection (b) carriers with fewer than 500,000 access lines, if the Commission determines either that such an exemption is in the public interest or that compliance would impose an undue burden. Subsection (d) is not, however, intended to preclude the Commission from granting relief in other meritorious circumstances where the public interest may warrant as, for example, in the case of rural telephone companies.

Section 222(e) defines "customer propriety network information," "subscriber list information," and "aggregate information." Subsection (e)(1) defines "customer proprietary network information." The term "customer" is intended to refer to the carrier's subscribers. The term "subscriber list information" is not intended to include any information identifying subscribers that is prepared or distributed within a company or between affiliates or that is provided to any person in a non-public manner.

Section 104(b) directs the Commission to review the impact of converging communications technologies on customer privacy. This section requires the Commission to commence a proceeding within one year after the date of enactment to examine the impact of converging technologies and globalization of communications networks has on the privacy rights of consumers and possible remedies to protect them. This section also directs changes in the Commission's regulations to ensure that customer privacy rights are considered in the introduction of new telecommunications service and directs the Commission to correct any defects in its privacy regulations that are identified pursuant to this section. The Commission is also directed to make any recommendations to Congress for any legislative changes required to correct such defects within 18 months after the date of enactment of this Act.

This section defines three fundamental principles to protect all consumers. These principles are: (1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other purposes; and (3) the right of consumers to stop the reuse or sale of that information.

Section 105. Pole Attachments

Pursuant to section 224 of the Communications Act of 1934, the Commission regulates pole attachment rates for cable television systems. Under current law, cable television systems pay for pole attachments based on a formula that sets a floor and ceiling for the rates. The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers. The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.

Section 105 is intended to remedy the inequity for pole attachments among providers of telecommunications services. First, it expands the scope of the coverage of section 224. Under current law, section 224(a)(4) currently defines "pole attachment" to mean any attachment by a cable television system to a pole, conduit, or right of way owned or controlled by a utility. This section expands the definition of "pole attachment" to include attachments by all providers of telecommunications services.

Second, the new provision changes the formula for the rates pole owners may charge for attachments to poles. It amends section 224 to direct the Commission, no later than one year after the date of enactment of the Communications Act of 1995, to prescribe regulations for ensuring that utilities charge just and reasonable and nondiscriminatory rates for pole attachments to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services.

The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and (3) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.

This new provision further provides that, to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by section 602(6) of the Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act). If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula. It is not the intention of the Committee to require a cable television system to pay twice for a single pole attachment if the operator is providing both cable and telecommunications services.

Finally, the new provision requires that whenever the owner of a conduit or right-of-way intends to modify or to alter such conduit or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.

ATTACHMENT 3

In the House of Representatives, U. S.,

October 12, 1995.

Resolved, That the bill from the Senate (S. 652) entitled "An Act to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes", do pass with the following

AMENDMENTS:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE; REFERENCES; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Communications Act of 1995".

(b) REFERENCES.—References in this Act to "the Act" are references to the Communications Act of 1934.

(c) TABLE OF CONTENTS.—

(A) to have knowledge that consumer information is being collected about them through their utilization of various communications technologies;

(B) to have notice that such information could be used, or is intended to be used, by the entity collecting the data for reasons unrelated to the original communications, or that such information could be sold (or is intended to be sold) to other companies or entities; and

(C) to stop the reuse or sale of that information.

(3) SCHEDULE FOR COMMISSION RESPONSES.—The Commission shall, within 18 months after the date of enactment of this Act—

(A) complete any rulemaking required to revise Commission regulations to correct defects in such regulations identified pursuant to paragraph (1); and

(B) submit to the Congress a report containing the recommendations required by paragraph (1)(C).

SEC. 106. POLE ATTACHMENTS.

Section 224 of the Act (47 U.S.C. 224) is amended—

(1) in subsection (a)(4)—

(A) by inserting after "system" the following: "or a provider of telecommunications service"; and

(B) by inserting after "utility" the following: ", which attachment may be used by such entities to provide cable service or any telecommunications service";

(2) in subsection (c)(2)(B), by striking "cable television services" and inserting "the services offered via such attachments";

(3) by redesignating subsection (d)(2) as subsection (d)(4); and

(4) by striking subsection (d)(1) and inserting the following:

"(d)(1) For purposes of subsection (b) of this section, the Commission shall, no later than 1 year after the date of enactment of the Communications Act of 1995, prescribe regulations for ensuring that, when the parties fail to negotiate a mutually agreeable rate, utilities charge just and reasonable and nondiscriminatory rates for pole attachments provided to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services (as defined in section 3 of this Act). Such regulations shall—

"(A) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attaching entities;

"(B) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity;

"(C) recognize that the pole, duct, conduit, or right-of-way has a value that exceeds costs and that value shall be reflected in any rate; and

"(D) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.

"(2) The final regulations prescribed by the Commission pursuant to paragraph (1) shall not apply to a cable television system that solely provides cable service as defined in section 602(6) of this Act; instead, the pole attachment rate for such systems shall assure a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied

by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

"(3) Whenever the owner of a conduit or right-of-way intends to modify or alter such conduit or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.".

SEC. 107. PREEMPTION OF FRANCHISING AUTHORITY REGULATION OF TELECOMMUNICATIONS SERVICES.

(a) TELECOMMUNICATIONS SERVICES.—Section 621(b) of the Act (47 U.S.C. 541(c)) is amended by adding at the end thereof the following new paragraph:

"(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

"(i) such cable operator or affiliate shall not be required to obtain a franchise under this title; and

ATTACHMENT 4

Calendar No. 45

104TH CONGRESS
1ST SESSION

S. 652

[Report No. 104–23]

To provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 30 (legislative day, MARCH 27), 1995

Mr. PRESSLER, from the Committee on Commerce, Science, and Transportation, reported the following original bill; which was read twice and placed on the calendar

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A BILL

To provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

and legitimate economic benefits'' and inserting ''scale or cost savings''.

(c) EFFECTIVE DATE.—The amendments made by this section take effect on the date of enactment of this Act.

SEC. 205. POLE ATTACHMENTS.

(a) IN GENERAL.—Section 224 (47 U.S.C. 224) is amended—

(1) by inserting after ''utility'' in subsection (a)(4) a comma and the following: ''which attachment may be used by that cable television system to provide cable service or any other telecommunications service''; and

(2) by redesignating subsections (b), (c), and (d) as (c), (d), and (e), respectively, and inserting the following after subsection (a):

''(b)(1) A utility shall provide a cable television system with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

''(2) For purposes of paragraph (1), the Commission shall, not later than 1 year after the date of enactment of the Telecommunications Act of 1995, prescribe regulations for ensuring that utilities charge just, reasonable, and nondiscriminatory rates for pole attachments provided to all telecommunications carriers and cable operators, in-

cluding such attachments used by cable television systems to provide telecommunications services. The regulations—

"(A) shall recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all attachments of entities that hold an ownership interest in the pole, duct, conduit, or right-of-way and therefore apportion the cost of the space other than the usable space equally among all such attachments; and

"(B) shall recognize that an entity that obtains an attachment through a license or other similar arrangement benefits from the entire pole, duct, conduit, or right-of-way other than the usable space in the same proportion as it benefits from the usable space and therefore apportion to such entity a portion of the cost of the space other than the usable space in the same manner as the cost of usable space is apportioned to such entity.".

(b) CONFORMING AMENDMENTS.—Section 224 (47 U.S.C. 224), as amended by subsection (a), is amended—

(1) by striking "subsection (c)" in subsection (c), as redesignated by subsection (a)(3), and inserting "subsection (d)"; and

(2) by striking "subsection (b)" in subsection (e), as so redesignated, and inserting "subsection (c)".

SEC. 206. ENTRY BY UTILITY COMPANIES.

(a) IN GENERAL.—

(1) AUTHORIZED ACTIVITIES OF UTILITIES.—Notwithstanding any other provision of law to the contrary (including the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.)), an electric, gas, water, or steam utility, and any subsidiary company, affiliate, or associate company of such a utility, other than a public utility holding company that is an associate company of a registered holding company, may engage, directly or indirectly, in any activity whatsoever, wherever located, necessary or appropriate to the provision of—

(A) telecommunications services,

(B) information services,

(C) other services or products subject to the jurisdiction of the Federal Communications Commission under the Communications Act of 1934 (47 U.S.C. 151 et seq.), or

(D) products or services that are related or incidental to a product or service described in subparagraph (A), (B), or (C).

ATTACHMENT 5

104TH CONGRESS
1ST SESSION

S. 652

AN ACT

To provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telecommunications Competition and Deregulation Act of 1995".

(e) EXPEDITED DECISION-MAKING FOR MARKET DETERMINATIONS UNDER SECTION 614.—

(1) IN GENERAL.—Section 614(h)(1)(C)(iv) (47 U.S.C. 614(h)(1)(C)(iv)) is amended to read as follows:

"(iv) Within 120 days after the date on which a request is filed under this subparagraph, the Commission shall grant or deny the request.".

(2) APPLICATION TO PENDING REQUESTS.—The amendment made by paragraph (1) shall apply to—

(A) any request pending under section 614(h)(1)(C) of the Communications Act of 1934 (47 U.S.C. 614(h)(1)(C)) on the date of enactment of this Act; and

(B) any request filed under that section after that date.

(f) EFFECTIVE DATE.—The amendments made by this section take effect on the date of enactment of this Act.

SEC. 204. POLE ATTACHMENTS.

Section 224 (47 U.S.C. 224) is amended—

(1) by inserting the following after subsection (a)(4):

"(5) The term 'telecommunications carrier' shall have the meaning given such term in subsection 3(nn) of this Act, except that, for purposes of this section, the term shall not include any person classified by the Commission as a dominant provider of telecommunications services as of January 1, 1995.";

(2) by inserting after "conditions" in subsection (c)(1) a comma and the following: "or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f),";

(3) by inserting after subsection (d)(2) the following:

"(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the pole attachment rates for cable television systems (or for any telecommunications carrier that was not a party to any pole attachment agreement prior to the date of enactment of the Telecommunications Act of 1995) to provide any telecommunications service or any other service subject to the jurisdiction of the Commission."; and

(4) by adding at the end thereof the following:

"(e)(1) The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1995, prescribe regulations in accordance with this subsection to govern the charges for pole attachments by telecommunications carriers. Such regulations shall ensure that utilities charge just and reasonable and non-discriminatory rates for pole attachments.

"(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals the sum of—

"(A) two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attachments, plus

"(B) the percentage of usable space required by each such entity multiplied by the costs of space other than the usable space;

but in no event shall such proportion exceed the amount that would be allocated to such entity under an equal apportionment of such costs among all attachments.

"(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity. Costs shall be apportioned between the usable space and the space on a pole, duct, conduit, or right-of-way other than the usable space on a proportionate basis.

"(4) The regulations required under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1995. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

"(f)(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

"(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of

safety, reliability, and generally applicable engineering purposes.

"(g) A utility that engages in the provision of telecommunications services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an amount equal to the pole attachment rate for which such company would be liable under this section.".

SEC. 205. ENTRY BY UTILITY COMPANIES.

(a) IN GENERAL.—

(1) AUTHORIZED ACTIVITIES OF UTILITIES.—Notwithstanding any other provision of law to the contrary (including the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.)), an electric, gas, water, or steam utility, and any subsidiary company, affiliate, or associate company of such a utility, other than a public utility company that is an associate company of a registered holding company, may engage, directly or indirectly, in any activity whatsoever, wherever located, necessary or appropriate to the provision of—

(A) telecommunications services,

(B) information services,

(C) other services or products subject to the jurisdiction of the Federal Communications